Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-115

INLAND OIL & TRANSPORT CO.,
Petitioner,

v.

BROCK ADAMS,
(previously William T. Coleman, Jr.),
Secretary of Transportation,

ADMIRAL OWEN W. SILER,
Commandant, United States Coast Guard,

and

DRAVO CORPORATION,
Respondents.

BRIEF

Of Dravo Corporation in Opposition to Petition for Writ of Certiorari

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Statutes

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STATUTES

Inland, in its Petition for Writ of Certiorari, has correctly cited all current revisions to 46 U.S.C. § 391a [Pet. for Writ., p. 2] but has inadvertently printed the pre-amended 1946 version of § 391a, (1)-(8) in the Appendix to its Petition [A, A-27-31]. Included in the Appendix hereto is the full current text of 46 U.S.C. § 391a, (1)-(13).

STATEMENT OF THE CASE

Dravo Corporation [hereafter "Dravo"] concurs with the Statement of the Case by Petitioner, Inland Oil and Transport Company [hereafter "Inland"] except to the extent hereinafter indicated.

Inland's Petition for Writ of Certiorari [hereafter cited as "Pet. for Writ"] states that "Inland alleged that the refusal (of the Coast Guard) to conduct X-ray testing was a violation of the Commandant's statutory duty to inspect barges and to establish rules and regulations for the protection of the marine environment . . ." [Pet. for Writ, p. 3] However, paragraph 13 of Inland's Complaint states that "(p)ursuant to the foregoing statutes (referring to 46 U.S.C. § 391(b) and certain cited sections of 46 U.S.C. § 391a) and the rules and regulations issued thereunder, the U.S. Coast Guard undertook to inspect the aforementioned four barges." [A, 4a] Inland also acknowledged the U.S. Coast Guard's use of "visual, air and water tests" on these barges in paragraph 28 of its Complaint. [A, 8a] It is clear that Inland's allegations were not that the Commandant violated his duty to inspect and to establish rules and regulations pursuant to the statute, but rather that such inspection and rules and regulations were inadequate in Inland's opinion.

It should be noted that Inland conceded in its appeal to the Eighth Circuit Court of Appeals that it was no longer entitled to the specific relief which it originally sought before the barges were certificated and sold to third parties [A, A-12], namely a stay of any action by the U.S. Coast Guard with respect to testing and certifying of these barges, and an order of the Court requiring the Coast Guard not to issue Certificates of Inspection to these barges until requiring or conducting extensive X-ray testing. [A, 9a] Inland then however, for the first time in this

suit suggested to the Court of Appeals in its Brief that the Court might consider declaratory relief. [A, A-12, f.n. 6]

Finally, it is also to be pointed out that assertions of Inland in its Statement of the Case contained in its Petition for Writ of Certiorari as to the possibility of harm to itself resulting from allegedly improperly certificated barges used by others [Pet. for Writ, p. 4] are not contained in its pleadings but only in legal briefs or memorandums filed with the Court. The Inland citation to "[Court of Appeals Appendix at 63a-64a]" [Pet. for Writ, p. 4] is likewise to a legal brief and not to its pleadings.

NOTE: All references to Petitioner's Appendix included with the Petition for Writ of Certiorari are designated herein as "[A, A-(Page No.)]". All references to the Appendix included with this Brief in Opposition to Petition for Writ of Certiorari are designated herein as "[A, (Page No.)a]".

ARGUMENT

The only apparent assertion by Inland, among the considerations enumerated in Supreme Court Rule 19, as to why certiorari should be granted in this case is that the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. [Pet. for Writ, p.5] However, such is not the case.

After a lengthy administrative appeal process and the completion of certain additional testing ordered by the Commandant, the four barges in question were certified by the Coast Guard, rejected by Inland, and subsequently sold to third parties. At that point, Inland's interest and position in this suit significantly and substantially changed. Petitioner has shifted from the position of a potentially directly concerned owner-user of these barges to a company claiming, in briefs but not in pleadings, possible indirect consequences to its property and the marine environment which might result if allegedly improperly certificated barges are continued to be used by others.

The parties all agree that in order for there to be an actual Article III "case or controversy", such as is necessary to empower federal courts to act, there must be demonstrated the existence of a "definite and concrete" controversy which "touch(es) the legal relations of parties having adverse legal interests." *De Funis v. Odegaard*, 416 U.S. 312, 317, 40 L. Ed.2d 164, 169, 94 S.Ct. 1704 (1974). However, this very case as cited by Petitioner in support of its Petition for Writ of Certiorari clearly is not in conflict with the decision of the Eighth Circuit Court of Appeals in finding the issue moot.

In *De Funis*, this Court found that the controversy between the law student and the law school, as to the school's initial refusal to admit him, was mooted when *De Funis* was admitted to, but had not completed, his final term of law school. This

Court noted that "De Funis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School." *Id.* 416 U.S. at 317, 40 L.Ed.2d at 169.

Likewise, Inland did not cast its suit in terms of a class action and the certification of the barges which it sought to prevent has been completed and the barges are in use.

Further, the *De Funis* case supports the Eighth Circuit's conclusion that ". . . the possibilities (of adverse effects) put forward by the plaintiff are too indirect, remote and conjectural to defeat the claim of mootness." [A, A-12] In *De Funis* it was argued that the case was not moot since plaintiff had not completed school and might not do so due to possible academic failure, economic circumstances or illness. This Court held that those possibilities were ". . . speculative contingencies (which) afford no basis for our passing on the substantive issues . . ." *De Funis v. Odegaard, supra*, 416 U.S. at 320, f.n. 5, 40 L.Ed. 2d at 171, citing *Hall v. Beals*, 396 U.S. 45, 49, 24 L.Ed. 2d 214, 90 S.Ct. 200 (1969).

The harm alleged by Inland in its pleadings in the District Court is illustrated by the following quotations from its Complaint below:

> "8. Inland intends to use the aforesaid barges to transport methyl alcohol, a cargo which is included in the classification set forth in paragraph 7 above.
>
> "9. Methyl alcohol is a liquid of extremely low viscosity and will leak through extremely small *holes or cracks* in barges.
>
> "15. An agent of Inland . . . selected certain areas of said barges and subjected said areas to radiographic tests (X-rays), which revealed a number of *defects* in welds in the sample area of the barges.

"29. *If* the methyl alcohol intended to be transported in the aforesaid barges *should leak* out of the barges there would be an extreme hazard to life and property due to the extreme flammability of the methyl alcohol and the likelihood of an explosion. Similarly, *if* methyl alcohol *should leak* out of the barges and into the water, its poisonous nature would create a hazard to the marine environment." [emphasis supplied] [A, 3a-9a]

Inland has not amended or supplemented its Complaint which is reprinted in full in the Appendix hereto [A, 1a-10a]. There are and have been no allegations in the pleadings or otherwise that methyl alcohol will or may be transported by the current barge owners, as to where those current owners will operate the barges, what would be the effect on Inland, or that the alleged welding "defects", which have passed Coast Guard leak testing with pressurized air and water tests, are "holes or cracks" through which *any* kind of cargo would leak. There must be a prospect of "immediacy and reality" to such allegations in order to constitute such an actual controversy. *Golden v. Zwickler*, 394 U.S. 103, 109, 22 L.Ed. 2d 113, 118, 89 S.Ct. 956 (1969); *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 85 L.Ed. 826, 829, 61 S.Ct. 510 (1941).

The substantially broadened concern of ". . . wide ranging economic liability in the event of spillage of hazardous cargo or an explosion . . ." [Pet. for Writ, p. 4] of allegedly improperly certificated barges used by others which Inland asserts in legal briefs, but not in its pleadings, is still too remote and speculative to have the required prospect of "immediacy and reality". Further, however, such assertions should be disregarded since factual statements and assertions contained in briefs are not a part of the record and should not be considered on appeal. *In re Frank Fehr Brewing Co.*, 268 F.2d 170, 183 (6th Cir. 1969), cert. den. *Kremer v. Clark*, 362 U.S. 963, 4 L.Ed.2d 878, 80 S.Ct. 880 (1960); *Nelson v. Swing-A-Way Mfg. Co.*,

266 F.2d 184, 190 (8th Cir. 1959); *Starke v. New York, Chicago & St. Louis Rwy. Co.*, 180 F.2d 569, 570 (7th Cir. 1950).

Inland then moves from "mootness" considerations to assertions regarding its "standing" by citing *United States v. SCRAP*, 412 U.S. 669, 37 L.Ed. 254, 93 S.Ct. 2405 (1973). Petitioner asserts that if the attenuated relationship between the agency action and the private harm alleged by plaintiffs in *United States v. SCRAP*, (that is, the effect of the 2½% rail freight surcharge on the discouragement of the use of recyclable materials and the resulting adverse effect on natural areas used by them) was sufficient to confer standing, then certainly Inland's position here is less tenuous. The defect in this argument is that we are not analyzing difficulties of proof but rather sufficiency of pleading.

". . . we deal here simply with the pleadings in which the appellees (SCRAP) alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." *United States v. SCRAP*, 412 U.S. 669, 689, 37 L.Ed.2d 254, 270.

The *SCRAP* plaintiffs did not allege mere possibility of harm. Although the line of causation was attenuated, they alleged that the harm would result. *Id.* at 688, 37 L.Ed.2d at 270. The *SCRAP* case went on to point out that ". . . pleadings must be something more than an ingenious exercise in the conceivable . . . not that he (plaintiff) can imagine circumstances in which he could be affected by the agency's action." *U.S. v. SCRAP*, 412 U.S. 669, 688-689, 37 L.Ed.2d 254, 270. Inland's pleadings assert no more than remote possibilities.

Petitioner cites *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 40 L.Ed.2d 1, 94 S.Ct. 1694 (1974) for the proposition that: "(i)f there is a continuing Article III case or controversy as to which the court can give effective relief, the action is

not moot." In this split court decision it was held that the termination of a specific strike had not mooted the issue of New Jersey's continuing practice and policy of granting state public welfare assistance to economic strikers. While the instant case neither presents the same broad reoccurring issues which are "incapable of review" nor represents a policy or procedure of a government agency which is not likely to change (see Commandant's final decision[1] [A, A-23]) there is another significant difference in the cases. In *Super Tire Engineering Co.* "(t)he petitioners (have) sought, from the very beginning, *declaratory* relief as well as an injunction." *Super Tire Engineering Co.*, 416 U.S. at 121, 40 L.Ed.2d at 7. In the instant case the only issue before the court was the requested judicial review of the Coast Guard's decision to issue Certificates of Inspection for these barges without additional X-ray inspection. The Certificates were issued in November 1976 and the barges sold and delivered to third parties in April 1977 [A, 12a]

The *Super Tire Engineering Co.* proposition above cited also raises the issue of whether the asserted case or controversy is one as to which the court is able to give "effective relief." See also *Mills v. Green*, 159 U.S. 651, 653, 40 L.Ed. 293, 294, 16 S.Ct. 132 (1895). The declaratory relief which was first suggested by Inland in its Brief before the Court of Appeals, presumably a declaration to the effect that the Secretary of Transportation and the Coast Guard Commandant acted improperly in certifying the barges, would not have the effect of revoking or cancelling the Certificates of Inspection already issued. Such relief

[1] "This does not mean the Coast Guard is not amenable to change. However, consideration by the Coast Guard of a proposal to impose a higher standard of construction/inspection than that presently utilized/required can only be predicated upon a complete review of casualty statistics or other data reflecting operating experience for the entire river barge industry indicating such a need. It is the intention of the Coast Guard to conduct such a review . . . This aspect will be addressed by separate correspondence . . ." [A, A-23].

would not resolve Inland's alleged concern for possible harm to the marine environment or to its property and employees.

Inland asserts in its Petition for Writ of Certiorari that since the Coast Guard has a responsibility to reinspect these barges every two years such a declaration could effect the reinspection procedures. Inland's Complaint related only to the initial certification rules, regulations and inspection procedures. There was never previously raised the issue of such reinspection rules, regulations and procedures and no reason to believe that such procedures are or ought to be the same as those for initial certification.

Further, if *any* relief sought by Inland or rendered by the court would involve a revocation or suspension of the Certificates, there would certainly be an adverse effect on the current barge owners who are not parties to this action. Thus, such relief should not be granted as it involves statutory rights of parties not before the court. *International Brotherhood of Teamsters v. Zantop Air Transport Corp.*, 394 F.2d 36, 41 (6th Cir. 1968).

To the extent that Inland is seeking a review of the application of the Coast Guard rules and regulations regarding issuing Certificates of Inspection for these four barges, this has been completed, the barges are in use by others and the issue is moot. To the extent this challenge is directed at changing allegedly inadequate Coast Guard rules and regulations regarding such inspections, 46 U.S.C. §391a(4) [A, 15a-16a] provides the precise procedural requirements for so doing and there has been no allegation that such procedures have not been followed or that rules and regulations do not exist. To the extent that Inland asserts that Dravo did not build or weld barges to proper contract requirements, that issue is still pending in the Federal District Court in the Western District of Pennsylvania in a breach of contract action between Inland and Dravo. [A, A-12]

CONCLUSION

For the reasons stated, there appears no reason to grant certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

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APPENDIX

APPENDIX A

United States District Court
Eastern District of Missouri
Eastern Division

Inland Oil & Transport Co.
2510 South Brentwood Boulevard
St. Louis, Missouri 63144,
Plaintiff,

vs.

William T. Coleman, Jr.
Secretary of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590
Serve:
U. S. Department of Transportation
1114 Market Street
St. Louis, Missouri 63101
and
Admiral Owen W. Siler
Commandant
U. S. Coast Guard
400 Seventh Street, S.W.
Washington, D.C. 20590
Serve:
2nd District Headquarters
U. S. Coast Guard
1520 Market Street
St. Louis, Missouri 63103,
Defendants.

Civil Action No.
76-761C(2).

COMPLAINT FOR JUDICIAL REVIEW AND STAY OF PROCEEDINGS
(Appeal From Final Agency Action)

(Filed August 23, 1976)

Comes now the plaintiff, Inland Oil & Transport Co. (hereinafter "Inland") and, for its cause of action against the defendants, states that:

1. Inland is a corporation incorporated and existing under the laws of the State of Missouri. Inland's principal place of business is located at 2510 South Brentwood Boulevard, St. Louis, Missouri 63144.

2. Defendant William T. Coleman, Jr. (hereinafter "the Secretary") is the Secretary of Transportation, Department of Transportation, Washington, D.C. 20590. The Department of Transportation is an agency of the United States Government.

3. Defendant Adm. Owen W. Siler (hereinafter "the Commandant") is the chief executive of the United States Coast Guard, 400 Seventh Street, S.W., Washington, D.C. 20590. The United States Coast Guard is an agency of the United States Government.

4. Jurisdiction in this Court is predicated on 28 U.S.C.A. § 1331 (Federal Question); 5 U.S.C.A. §§ 702 through 706 (Review of Agency Action—Administrative Procedure Act); and 46 U.S.C.A. § 391a. The amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000), exclusive of interest and costs.

5. Inasmuch as Inland resides within the Eastern Judicial District of Missouri, pursuant to 28 U.S.C.A. § 1391(e), venue properly lies in this District.

6. On or about December 5, 1973, Inland entered into a written agreement with the Dravo Corporation (hereinafter "Dravo"), Pittsburgh, Pennsylvania, under the terms of which Dravo agreed to build and sell to Inland, and Inland agreed to

buy, one double skin, integrated tank barge fleet consisting of four barges.

7. The barges to be sold to Inland by Dravo are to be furnished with a U. S. Coast Guard Certificate of Inspection for the carriage of Grade A or lower cargoes of flammable or combustible liquids.

8. Inland intends to use the aforesaid barges to transport methyl alcohol, a cargo which is included in the classification set forth in paragraph 7 above.

9. Methyl alcohol, also known as wood alcohol, is a highly flammable, poisonous, liquid alcohol, formed in the destructive distillation of wood or made synthetically and is used as a solvent, anti-freeze, or denaturant for ethyl alcohol and in the synthesis of other chemicals. Methyl alcohol is a liquid of extremely low viscosity and will leak through extremely small holes or cracks in barges.

10. Pursuant to the provisions of Title 52 of the Revised Statutes of the United States:

> "The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service . . . the hull of each steam vessel, not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed . . . and is in a condition to warrant the belief that she may be used in navigation with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; . . .". (46 U.S.C.A. 391(b))

11. Section 391a.(2), 46 U.S.C.A., provides:

"All vessels, regardless of tonnage size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, which are documented under the laws of the United States or enter the navigable waters of the United States, except public vessels other than those engaged in commercial service, that shall have on board liquid cargo in bulk which is—(A) inflammable or combustible . . . shall be considered steam vessels for the purposes of title 52 of the Revised Statutes of the United States, and shall be subject to the provisions thereof."

12. Section 391a.(5), 46 U.S.C.A., provides:

"No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations for vessel safety established hereunder, have on board such cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes of the United States and until a permit has been endorsed on such certificate of inspection by the Secretary, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Secretary on such certificate of inspection until such vessel has been inspected by the Secretary and found to be in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder."

13. Pursuant to the foregoing statutes and rules and regulations issued thereunder, the U. S. Coast Guard undertook to inspect the aforementioned four barges.

14. The inspection of the barges made by the U. S. Coast Guard agent consisted of a visual inspection for faulty welds,

an air test whereby the barges are filled with air and inspected for leaks, and a water test whereby the barges are filled with water and inspected for leaks. Based upon said inspection, the U. S. Coast Guard intended to issue Certificates of Inspection and permits for said barges.

15. An agent of Inland, Mr. William A. Svekric, of the Col-X Corporation, selected certain areas of said barges and subjected said areas to radiographic tests (X-rays), which revealed a number of defects in welds in the sample areas of the barges, and he advised the Coast Guard of his findings.

16. The U. S. Coast Guard examined the results of Mr. Svekric's tests and concluded that the sum tended to show a definite pattern of defects at high stress areas of the barges in question, thus demonstrating the inadequacy of the air, water and visual tests employed by the U. S. Coast Guard. Commander C. E. Pitcock, Commanding Officer, U. S. Coast Guard, Marine Safety Office, Pittsburgh, Pennsylvania, by orders dated April 21, 1976 and May 28, 1976 (Exhibits A and B attached hereto and made a part hereof), instructed Dravo that prior to certification all rejected areas determined by the radiographs were to be excavated to sound material and repaired using good marine practice. He further instructed Dravo that certain areas of the said barges were to be given additional NDT (non-destructive testing) and that Dravo was to furnish the U. S. Coast Guard with an approved procedure for the non-destructive testing. All repaired areas were then to be retested to the satisfaction of the U. S. Coast Guard inspector. Commander Pitcock informed Inland that any defective welds detected by Inland and brought to the U. S. Coast Guard's attention would be corrected.

17. Subsequent to Commander Pitcock's order of April 21, 1976, Dravo filed an administrative Appeal from Commander Pitcock's order to the Second Coast Guard District.

18. On May 19, 1976, Inland filed its administrative appeal relating only to the second instruction to Dravo that "identical areas to those rejected are to be given a non-destructive test . . ." (see Exhibit C attached hereto and made a part hereof).

19. On June 3, 1976, the Commander, Second Coast Guard District, by Captain J. W. Leadbetter, Chief, Marine Safety Division, denied Inland's appeal. In said denial Captain Leadbetter affirmed the order of Commander Pitcock and noted that Commander Pitcock's order had been clarified May 28, 1976, with certain specific requirements (see Exhibit B attached hereto).

20. On June 4, 1976, Inland submitted to Captain Leadbetter certain documents in connection with its appeal and asked that Captain Leadbetter's decision of June 3, 1976, denying Inland's appeal, be set aside.

21. On June 7, 1976, Captain Leadbetter advised Inland that, after having considered the additional material submitted to him on June 4, he saw no reason to change his June 3, 1976 decision. Captain Leadbetter further advised that Inland's June 4 letter, together with enclosures, was being forwarded to the Commandant of the U. S. Coast Guard as part of Inland's appeal.

22. On June 9, 1976, Inland appealed to the Commandant of the U. S. Coast Guard the decision of Captain J. W. Leadbetter as noted in his letters of June 3 and June 7 aforesaid.

23. On August 13, 1976, the Commandant of the U. S. Coast Guard issued his final decision on Inland's administrative appeal, a copy of which is attached hereto as Exhibit D and made a part hereof. Said decision modified the order issued by Commander Pitcock and affirmed by Captain Leadbetter by setting aside the requirement for additional NDT (non-destructive testing) and requiring reverse hydrostatic testing, another water test, as proposed by Dravo as a supplement to the usual visual examination and testing of all welds.

24. Said final decision of the Commandant further stated:

> "The application of a reverse hydrostatic test therefore remains as the final standard to be applied in this case."

Inland has been advised that such hydrostatic tests will commence on Monday, August 23, 1976, at 8:00 a.m. in Pittsburgh, Pennsylvania. Inland has reason to believe that if the results of the tests are satisfactory to the U. S. Coast Guard, Certificates of Inspection and permits will be issued forthwith.

25. Inland, having exhausted its administrative remedies, herewith petitions this Court for a review of the aforesaid final decision of the Commandant of the U. S. Coast Guard pursuant to 5 U.S.C.A. §702 and for a stay of any action by the U. S. Coast Guard with respect to the barges which are the subject matter of this action pursuant to 5 U.S.C.A. §705.

26. Inland alleges that the air, water and visual inspections which have already been conducted by the U. S. Coast Guard and proved to have been inadequate, and the further similar tests ordered to be performed by Dravo pursuant to the Commandant's final decision as stated above, are wholly inadequate and insufficient to determine whether the barges are in compliance with the statutes quoted above, and that any Certificates of Inspection and any permits issued by the U. S. Coast Guard pursuant to said inspections would violate the statutory mandate of the Congress and violate the statutory duties imposed upon the U. S. Coast Guard.

27. The Congressional mandate and the obligation of the U. S. Coast Guard pursuant thereto are clearly delineated in 46 U.S.C.A. § 391a.(1), which provides:

> "The Congress hereby finds and declares—that the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but

not limited to fish, shellfish, and wildlife, marine and coastal ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the 'marine environment'.

That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment. (emphasis added)

That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property and the marine environment."

27. (sic) 46 U.S.C.A. § 391a.(3) requires the Secretary to:

"[E]stablish for the vessels to which this section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; . . ."

28. The U. S. Coast Guard's visual, air and water tests conducted and to be conducted in the inspection of the aforementioned barges do not comport with the Congressional statement of policy in 46 U.S.C.A. § 391a.(1), nor do such tests comport with Congress' mandate to the Secretary to establish rules and regulations for the protection of the marine environment and for vessel safety as provided for in 46 U.S.C.A. § 391a.(3).

29. If the methyl alcohol intended to be transported in the aforesaid barges should leak out of the barges there would be an extreme hazard to life and property due to the extreme flammability of the methyl alcohol and the likelihood of an explosion. Similarly, if methyl alcohol should leak out of the barges and into the water, its poisonous nature would create a hazard to the marine environment.

30. Thus, the final decision of the Commandant herein appealed from is:

a. Arbitrary;

b. Capricious;

c. An abuse of his discretion;

d. Not in accordance with law;

e. Without observance of procedure required by law; and

f. Unwarranted by the facts.

WHEREFORE, Inland prays that this Court:

(a) Reverse and set aside the August 13, 1976 final decision of the Commandant of the U. S. Coast Guard;

(b) Affirm the April 21, 1976 order of Commander Pitcock, as clarified by his May 28, 1976 order requiring NDT (nondestructive testing) of the barges which are the subject matter of this action;

(c) Grant Inland the relief sought in its appeal of May 19, 1976 with regard to broadening the scope of NDT to be required by the aforesaid orders of Commander Pitcock;

(d) Stay any action by the U. S. Coast Guard with respect to the barges which are the subject matter of this action so as to preserve the status and rights of Inland pending conclusion of this review proceeding, pursuant to 5 U.S.C.A. § 705; and

(e) Enter such other and further orders as to this Court may seem just and proper in the premises.

State of Missouri
County of St. Louis } ss.

JAMES F. DOWD, III, being first duly sworn upon his oath, hereby states that he is a Vice President of Inland Oil & Transport Co., that he has read the foregoing Complant, and that the allegations recited therein are true to the best of his knowledge, information and belief.

He further states that he is the agent of this corporation for the purposes of verifying the Complaint in this action.

INLAND OIL & TRANSPORT CO.
/s/ By JAMES F. DOWD, III

Subscribed and sworn to before me this 23rd day of August, 1976.

/s/ CLAUDINE J. SMITH
Notary Public

My commission expires March 24, 1980

(Seal)

LEWIS, RICE, TUCKER, ALLEN and CHUBB
By ALLEN S. BOSTON
1400 Railway Exchange Building
611 Olive Street
St. Louis, Missouri 63101
314-231-5833
Attorneys for Plaintiff

Note: The Exhibits referred to in this Complaint as Exhibits A, B and D are not reprinted here as they were printed in full as Appendix D, E and F to Petition for Writ of Certiorari [A, 15-24]

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

Inland Oil & Transport Co.,
Plaintiff,
vs.
William T. Coleman, Jr., Secretary of Transportation,
and
Admiral Owen W. Siler, Commandant U. S. Coast Guard,
Defendants,
Dravo Corporation,
Defendant by Intervention.

Civil Action
No. 76-761C(2)

AFFIDAVIT IN SUPPORT OF MOTION OF DRAVO CORPORATION TO DISMISS COMPLAINT FOR JUDICIAL REVIEW OR FOR SUMMARY JUDGMENT

(Filed April 22, 1977)

Commonwealth of Pennsylvania
County of Allegheny } ss.

Comes now the affiant, J. L. Miller, having been duly sworn, and states the following:

1. I am General Contract Manager of the Engineering Works Division of Dravo Corporation and have served Dravo in various capacities for thirty-five years.

2. On November 15, 1976, pursuant to contract between Dravo Corporation and Inland Oil & Transport Co., Dravo tendered for delivery to Inland four (4) double skin tank barges identified as Dravo hulls 6617, 6618, 6619 and 6620.

3. Said barges have been certificated by the United States Coast Guard for carriage of Subchapter D cargoes including methyl alcohol.

4. On November 23, 1976, Inland Oil & Transport Co. rejected delivery of said barges.

5. Dravo considers Inland's rejection wrongful, considers Inland in breach of contract and has taken legal action in pursuit to remedy for said breach.

6. On February 18, 1977, Dravo entered into a contract for sale of hulls 6617, 6618 and 6620 to William B. Patton Towing Company of Friendswood, Texas. Delivery of said barges to Patton is scheduled for on or about April 22, 1977.

7. On April 21, 1977 Dravo entered into a contract for sale of hull 6619 to Thomas Marine Company of Butler, Pennsylvania. Delivery of said barge to Thomas Marine is scheduled for April 22, 1977.

FURTHER AFFIANT SAYETH NOT

I have read the foregoing Affidavit and, to the best of my information and belief, the statements contained therein are true and correct.

/s/ J. L. MILLER

Subscribed and sworn to before me this 21st day of April, 1977.

/s/ MARILYN N. VOGEL, Notary Public
Neville Township, Allegheny County
My Commission Expires Dec. 19, 1978
Member Pennsylvania Association of Notaries

APPENDIX C

[From Title 46, U.S.C.]

§ 391a. Vessels carrying certain cargoes in bulk

(1) Statement of Policy.—The Congress hereby finds and declares—

That the carriage by vessels of certain cargoes in bulk create substantial hazards to life, property, the navigable waters of the United States (including the quality thereof) and the resources contained therein and of the adjoining land, including but not limited to fish, shellfish, and wildlife, marine and coastal ecosystems and recreational and scenic values, which waters and resources are hereafter in this section referred to as the "marine environment."

That existing standards for the design, construction, alteration, repair, maintenance and operation of such vessels must be improved for the adequate protection of the marine environment.

That it is necessary that there be established for all such vessels documented under the laws of the United States or entering the navigable waters of the United States comprehensive minimum standards of design, construction, alteration, repair, maintenance, and operation to prevent or mitigate the hazards to life, property and the marine environment.

(2) Vessels included.—All vessels, regardless of tonnage size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, which are documented under the laws of the United States or enter the navigable waters of the United States, except public vessels other than those engaged in commercial service, that shall have on board liquid cargo in bulk which is—

(A) inflammable or combustible, or

(B) oil, of any kind or in any form, including but not limited to petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, or

(C) designated as a hazardous polluting substance under section 1162(a) of Title 33;

shall be considered steam vessels for the purposes of title 52 of the Revised Statutes of the United States and shall be subject to the provisions thereof: *Provided,* That (i) this section shall not apply to vessels having on board the substances set forth in (A), (B), or (C) above only for use as fuel or stores or to vessels carrying such cargo only in drums, barrels or other packages;

(ii) nothing contained herein shall be deemed to amend or modify the provisions of section 4 of Public Law 93-397 with respect to certain vessels of not more than five hundred gross tons;

(iii) this section shall not apply to vessels of not more than five thousand gross tons used in the processing and assembling of fishery products in the fisheries of the States of Oregon, Washington, and Alaska and such vessels shall be allowed to have on board inflammable or combustible cargo in bulk to the extent and upon conditions as may be required by the Secretary of the department in which the Coast Guard is operating, and

(iv) this section shall not apply to vessels of not more than five hundred gross tons documented in the service of oil exploitation which are not tank vessels and which would be subject to this section only because of the transfer of fuel from the vessels' own fuel supply tanks to offshore drilling or production facilities.

(3) Rules and Regulations.—In order to secure effective provision (A) for vessel safety, and (B) for protection of the marine environment, the Secretary of the department in which the Coast Guard is operating (hereafter referred to in this section as the "Secretary") shall establish for the vessels to which this

section applies such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels; and the duties and qualifications of the officers and crew thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Secretary may, after hearing as provided in subsection (4), adopt rules of the American Bureau of Shipping or similar American classification society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations, the Secretary shall give due consideration to the kinds and grades of such cargo permitted to be on board such vessel. In establishing such rules and regulations the Secretary shall, after consultation with the Secretary of Commerce and the Administrator of the Environmental Protection Agency, identify those established for protection of the marine environment and those established for vessel safety.

(4) Adoption of Rules and Regulations.—Before any rules or regulations, or any alteration, amendment, or repeal thereof, are approved by the Secretary under the provisions of this section, except in an emergency, the Secretary shall (A) consult with other appropriate Federal departments and agencies, and particularly with the Administrator of the Environmental Pro-

tection Agency and the Secretary of Commerce, with regard to all rules and regulations for the protection of the marine environment, (B) publish proposed rules and regulations, and (C) permit interested persons an opportunity for hearing. In prescribing rules or regulations, the Secretary shall consider, among other things, (i) the need for such rules or regulations, (ii) the extent to which such rules or regulations will contribute to safety or protection of the marine environment, and (iii) the practicability of compliance therewith, including cost and technical feasibility.

(5) Rules and Regulations for Safety; Inspection; Permits, Foreign Vessels.—No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations for vessel safety established hereunder, have on board such cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes of the United States and until a permit has been endorsed on such certificate of inspection by the Secretary, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder, and showing the kinds and grades of such cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Secretary on such certificate of inspection until such vessel has been inspected by the Secretary and found to be in compliance with the provisions of this section and the rules and regulations for vessel safety established hereunder. For the purpose of such inspection, approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and the reliability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A certificate issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject

to revocation by the Secretary whenever he shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Provided*, That rules and regulations for vessel safety established hereunder and the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States: *And provided further*, That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 170 of this title.

(6) Rules and Regulations for Protection of the Marine Environment; Inspection; Certification.—No vessel subject to the provisions of this section shall, after the effective date of rules and regulations for protection of the marine environment, have on board such cargo, until a certificate of compliance, or an endorsement on the certificate of inspection for domestic vessels, has been issued by the Secretary indicating that such vessel is in compliance with such rules and regulations. Such certificate of compliance or endorsement shall not be issued by the Secretary until such vessel has been inspected by the Secretary and found to be in compliance with the rules and regulations for protection of the marine environment established hereunder. A certificate of compliance or an endorsement issued under this subsection shall be valid for a period specified therein by the Secretary and shall be subject to revocation whenever the Secretary finds that the vessel concerned does not comply with the conditions upon which such certificate or endorsement was issued.

(7) Rules and Regulations for Protection of the Marine Environment Relating to Vessel Design and Construction, Alteration, and Repair; International Agreement.—(A) The Secretary shall begin publication as soon as practicable of proposed rules and regulations setting forth minimum standards of design, con-

struction, alteration, and repair of the vessels to which this section applies for the purpose of protecting the marine environment. Such rules and regulations shall, to the extent possible, include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities.

(B) The Secretary shall cause proposed rules and regulations published by him pursuant to subsection (7) (A) to be transmitted to appropriate international forums for consideration as international standards.

(C) Rules and regulations published pursuant to subsection (7) (A) shall be effective not earlier than January 1, 1974, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, unless the Secretary shall earlier establish rules and regulations consonant with international treaty, convention, or agreement, which generally address the regulation of similar topics for the protection of the marine environment. In absence of the promulgation of such rules and regulations consonant with international treaty, convention, or agreement, the Secretary shall establish an effective date not later than January 1, 1976, with respect to foreign vessels and United States-flag vessels operating in the foreign trade, for rules and regulations previously published pursuant to this subsection (7) which he then deems appropriate. Rules and regulations published pursuant to subsection (7)(A) shall be effective not later than June 30, 1974, with respect to United States-flag vessels engaged in the coastwide trade.

(D) Any rule or regulation for protection of the marine environment promulgated pursuant to this subsection (7) shall be

equally applicable to foreign vessels and United States-flag vessels operating in the foreign trade. If a treaty, convention, or agreement provides for reciprocity of recognition of certificates or other documents to be issued to vessels by countries party thereto, which evidence compliance with rules and regulations issued pursuant to such treaty, convention, or agreement, the Secretary, in his discretion, may accept such certificates or documents as evidence of compliance with such rules and regulations in lieu of the certificate of compliance otherwise required by subsection (6) of this section.

(8) Shipping Documents—Vessels, subject to the provisions of this section shall have on board such shipping documents as may be prescribed by the Secretary indicating the kinds, grades, and approximate quantities of such cargo on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

(9) Officers; Tankermen; Certification.—(A) In all cases where the certificate of inspection does not require at least two licensed officers, the Secretary shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certified as tankermen.

(B) The Secretary shall issue to applicants certificates as tankermen, stating the kinds of cargo the holder of such certificate is, in the judgment of the Secretary, qualified to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Secretary, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Secretary under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is

provided in the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title.

(10) Effective Date of Rules and Regulations.—Except as otherwise provided herein, the rules and regulations to be established pursuant to this section shall become effective ninety days after their promulgation unless the Secretary shall for good cause fix a different time. If the Secretary shall fix an effective date later than ninety days after such promulgation, his determination to fix such a later date shall be accompanied by an explanation of such determination which he shall publish and transmit to the Congress.

(11) Penalties.—(A) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall violate the provisions of this section, or the rules and regulations established hereunder, shall be liable to a civil penalty of not more than $10,000.

(B) The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of them, who shall knowingly and willfully violate the provisions of this section or the rules and regulations established hereunder, shall be subject to a fine of not less than $5,000 or more than $50,000, or imprisonment for not more than five years, or both.

(C) Any vessel subject to the provisions of this section, which shall be in violation of this section or the rules and regulations established hereunder, shall be liable in rem and may be proceeded against in the United States district court for any district in which the vessel may be found.

(12) Injunctive Proceedings.—The United States district courts shall have jurisdiction for cause shown to restrain violations of this section or the rules and regulations promulgated hereunder.

(13) Denial of Entry.—The Secretary may, subject to recognized principles of international law, deny entry into the navi-

gable waters of the United States to any vessel not in compliance with the provisions of this section or the regulations promulgated thereunder.

As amended July 11, 1968, Pub.L. 90-397, § 4, 82 Stat. 341; July 10, 1972, Pub.L. 92-340, Title II, § 201, 86 Stat. 427, Nov. 16, 1973, Pub.L. 93-153, Title IV, § 401, 87 Stat. 589; Oct. 1, 1974, Pub.L. 93-430, § 6 (3), 88 Stat. 1183.